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June 16, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Opposition to Petitions for Reconsideration and Clarification By NATOA, et al. in MM Docket No. 92-266

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.429(f), please find enclosed, on behalf of NATOA, et al., an original and eleven copies of an Opposition to Petitions for Reconsideration in the above-referenced proceeding.

Any questions regarding the submission should be referred to the undersigned.

Thank you for your attention to this matter.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266 MM Docket No. 93-215
Rate Regulation	)	

TO: The Commission

OPPOSITION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE CITY OF NEW YORK TO PETITIONS FOR RECONSIDERATION

The National Association of Telecommunications Officers and Advisors and the City of New York (collectively, the "Local Governments") hereby submit this Opposition to Petitions for Reconsideration in the above-captioned proceedings. In particular, the Local Governments urge the Federal Communications Commission ("Commission" or "FCC"): (1) not to prohibit franchising authorities from determining whether an "a la carte" service tier should be counted in establishing the permissible rate for basic service; (2) not permit certain capital upgrade expenditures to be passed through as external costs; (3) not permit external costs to be passed through automatically 30 days after notification to the franchising authority; (4) not amend

the cost-of-service rules to allow recovery of, and return on, the net investment in intangible assets acquired prior to regulation; and (5) not limit FCC review of any cable programming service complaints filed after February 28, 1994 to just the reasonableness of a rate increase, instead of the reasonableness of the overall rate.

DISCUSSION

1. Franchising Authorities Should Be Permitted to Determine Whether "A La Carte" Services Should Be Counted in Establishing the Permissible Rate for the Basic Service Tier

The Local Governments oppose the suggestion that franchising authorities should not have the right to determine whether "a la carte" service tiers should be considered in setting the proper rate for the basic service tier.[1] Franchising authorities must have the power to determine whether such tiers should be counted in calculating the permissible benchmark rate for the basic service tier, otherwise franchising authorities would be forced to accept basic service tier rates that are at unreasonable levels merely as a result of the fact that they cannot take into account in establishing the basic rate an "a la carte" tier that might be

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[1] See Comments of Ovation, Inc, and PBS Horizons Cable Network, filed in MM Dkt. No. 92-266, at 19-25 (May 16, 1994) ("Ovation, Inc.").

subject to regulation under the Commission's rules because it is not a true "a la carte" offering.

To ensure that franchising authorities are able to establish "reasonable" basic rates, the Commission's a la carte rules must be upheld. Petitioner's concern that franchising authorities may misapply the Commission's rules is not relevant. The Commission has made clear that cable operators can fully protect their rights by filing an appeal with the Commission.[2]

Finally, Ovation, Inc.'s assertion that the FCC's "a la carte" rules result in a sharing with franchising authorities of the FCC's "exclusive jurisdiction over cable programming rates" is wrong.[3] The Commission retains exclusive authority in deciding the reasonableness of rates for "a la carte" service tiers that are determined to be cable programming service tiers under the Commission's rules.

2. Upgrade Costs Should Not Be Treated as External Costs

Local Governments oppose petitioners that request the Commission to treat certain upgrade costs as

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[2] See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration (MM Dkt. No. 92-266), FCC 94-38 at 100, ¶ 199 (released Mar. 30, 1994) ("Second Order on Reconsideration").

[3] See Ovation, Inc. at 23.

external costs.[4] The Commission correctly concluded that upgrade costs should not be treated as external costs under the rules for benchmark rate regulation.[5]

As NATOA already has noted in comments filed in the rate regulation proceeding, the treatment of upgrade costs as external costs would give cable operators yet another opportunity to undermine the limited rate protections granted cable subscribers under the benchmark regulations by exploiting the so-called "external cost" rules.[6] Local Governments already are concerned that exceptions to the benchmark rates for "external costs" will be the subject of abuse by cable operators. Permitting external cost treatment of upgrade costs -- with the substantial rate increases that would likely follow -- would make a mockery of the Commission's benchmark approach to protecting the public. For these reasons, and the reasons NATOA has advanced in previous comments filed in the rate regulation proceeding, Local Governments strongly

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[4] See Ovation, Inc. at 25-26; Public Interest Petitioners' Petition for Expedited Reconsideration, filed in MM Dkt. Nos. 92-266 and 93-215, at 15 (May 16, 1994) ("Public Interest Petitioners").

[5] See Second Order on Reconsideration at 124, ¶ 243 n.340.

[6] See, e.g., Comments of NATOA, et al., filed in MM Dkt. No. 92-266 (Sept. 30, 1993).

support the Commission's conclusion not to treat upgrade costs as external costs.

3. External Costs Should Not Be Passed Through Automatically 30 Days after Notification to the Franchising Authority

The Local Governments oppose suggestions that external costs should be automatically passed through to subscribers 30 days after notification to the franchising authority.[7] External cost increases, like any other rate increase, must be subject to the full review period permissible under 47 C.F.R. § 76.933. Because, as Ovation, Inc. notes, the application of Section 76.933 to external cost rate proceedings is made somewhat unclear by language in the Commission's initial Report and Order in the rate regulation proceeding,[8] the Local Governments urge the Commission to clarify that each of the review periods under Section 76.933 may apply to an external cost rate proceeding.

Based on the experience of franchising authorities thus far in rate proceedings, the Local Governments believe it is imperative that franchising authorities have the right to extend the initial 30-day rate review period if necessary to ensure that a

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[7] See Ovation, Inc. at 17-19; Petition of United Video for Reconsideration, filed in MM Dkt. No. 92-266, at 2-5 (May 16, 1994) ("United Video").

[8] See Ovation, Inc. at 17-18.

proposed external cost rate increase is properly evaluated for its reasonableness. Franchising authorities in most rate proceedings have found that it is impossible to determine whether cable operators' rates are reasonable in the initial 30-day review period because cable operators rarely provide sufficient information by which to justify their rates.[9] Cable operators should not be able to take advantage of their own insufficient filings to automatically pass through external cost increases at the end of the initial 30-day review period. To protect consumers from unreasonable external cost increases, franchising authorities must have the authority to extend the initial 30-day rate review period, and toll the effectiveness of the rate increase, if the franchising authority is unable to determine the reasonableness of an external cost increase within the first 30-day period.

4. The Cost-of-Service Rules Should Not Allow Recovery of the Net Investment in Intangible Assets Acquired Prior to Regulation

The Local Governments oppose those petitioners who suggest that cable operators should be permitted to include the value of intangible assets, such as the

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[9] Franchising authorities also have found that the Commission's rate rules have become extremely complex after numerous revisions by the Commission -- thus compounding the difficulty of determining whether rates are reasonable during the initial 30-day review period.

value of franchise or franchise rights, acquired prior to regulation in justifying their rates pursuant to a cost-of-service submission.[10] As NATOA has previously noted in the cost-of-service proceeding, there is no reason whatsoever for cable subscribers to pay higher rates to allow an operator to recover such intangible costs.[11] This is especially true in light of the fact that a system's subscribers enjoy no benefit from such intangible assets, since such assets in no way contribute to, or improve, cable service.

5. The Commission Is Correct to Review Cable Programming Service Complaints filed after February 28, 1994 With Respect to the Reasonableness of the Overall Rate

The Local Governments oppose those petitioners who suggest that the Commission should be limited to reviewing only the reasonableness of a rate increase, instead of the reasonableness of the overall rate, in reviewing cable programming service complaints filed after February 28, 1994.[12] The Local Governments believe that the Commission has correctly concluded that

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[10] See Petition for Reconsideration by Comcast Cable Communications, Inc., filed in MM Dkt. No. 93-215, at 15-17 (May 16, 1994); Petition for Reconsideration by Cablevision Industries, Inc., filed in MM Dkt. No. 93-215, at 12-19 (May 16, 1994).

[11] See, e.g., Comments of NATOA, et al., filed in Dkt. No. 93-215 (August 23, 1993).

[12] See Ovation, Inc. at 13-17; Public Interest Petitioners at 15; United Video at 9.

the Commission is permitted to consider the reasonableness of the overall rate. The Commission correctly interpreted as a procedural requirement the provision under 47 U.S.C. § 543(c)(3), which requires that complaints about cable programming service tier rates in effect on the effective date of the Commission's rules be filed within 180 days -- or by February 28, 1994. The Commission correctly concluded that this provision simply prohibited complainants from filing complaints after the 180-day period until after the cable operator raised its cable programming service tier rate, and that the provision did not limit the Commission's right to review the reasonableness of the overall rate.

CONCLUSION

The Commission should deny certain petitions for reconsideration in these proceedings for the reasons suggested above by the Local Governments.

Respectfully Submitted,

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June 16, 1994

CERTIFICATE OF SERVICE

I, William E. Cook, Jr., an attorney at Arnold & Porter, certify that copies of the foregoing Opposition of NATOA, et al. to Petitions for Reconsideration were served by first class mail on this 16th day of June 1994, postage prepaid, to the following petitioners:

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